UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

TUBE CITY IMS, LLC,

And **Case 07-CA-154813**

LOCAL 324, INTERNATIONAL UNION OF OPERATING ENGINEERS (IUOE), AFL-CIO

Mary Beth Foy, Esq.,
for the General Counsel.
Joseph Quinn, Esq.,
for the Respondent.
Amy Bachelder, Esq.,
for the Charging Party.

DECISION

STATEMENT OF THE CASE

MELISSA M. OLIVERO, Administrative Law Judge. This case was tried in Detroit, Michigan, on December 7, 2015. Local 324, International Union of Operating Engineers (IUOE), AFL–CIO (Union), filed the charge on June 24, 2015, and an amended charge on August 14, 2015.[1] GC Exh. 1(a) and (b).[2] The General Counsel issued the complaint on September 22, alleging that Tube City IMS, LLC (Respondent) violated Section 8(a)(3) and (1) of the National Labor Relations Act (Act) by discharging Josh Maier, an employee of Respondent, because he supported the Union and engaged in protected concerted activity. GC Exh. 1(g). Respondent filed a timely answer denying the violation alleged in the complaint. GC Exh. 1(i). On the entire record, including my observation of the demeanor of the witnesses,[3] and after considering the briefs filed by the General Counsel and Respondent, I make the following

[1] All dates are in 2015 unless otherwise indicated.

[2] Abbreviations used in this decision are as follows: "Tr." for transcript; "GC Exh." for General Counsel's Exhibit; "R. Br." for Respondent's brief; and "GC Br." for the General Counsel's brief.

[3] Although I have included citations to the record to highlight particular testimony or exhibits, my findings and conclusions are not based solely on those specific record citations, but rather on my review and consideration of the entire record for this case. My findings of fact encompass the credible testimony and evidence presented at trial, as well as logical inferences drawn therefrom.

FINDINGS OF FACT

I. JURISDICTION

Respondent, a limited liability company, provides industrial steel scrap and mill services at its facility in Monroe, Michigan, where it annually performs services valued in excess of $50,000 in States other than the State of Michigan. Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act. GC Exh. 1(i).

II. ALLEGED UNFAIR LABOR PRACTICES

A. Respondent's Operations and Management Structure

Respondent provides complete mill services, including steel scrap and metal recovery, at its numerous facilities across the country. Tr. 85. At the Monroe, Michigan facility (Monroe facility) these services are performed for the nearby Gerdau Steel mill. Tr. 11. Since August 11, Respondent has had approximately 24 hourly employees working at the Monroe facility. GC Exh. 3; Tr. 7; 86.

Neal Halle is the site manager at the Monroe facility and he is responsible for day-to-day operations there. All of the hourly employees at the Monroe facility report to Halle. Halle reports to Ty Reynolds, the general manager for the Monroe facility. Reynolds also manages 7 other facilities for Respondent. Reynolds' office is located in Middletown, Ohio, and he conducts a daily conference call with his site managers, including Halle. Respondent admits, and I find, that Halle and Reynolds are supervisors of Respondent within the meaning of Section 2(11) of the Act or agents of Respondent within the meaning of Section 2(13) of the Act. GC Exh. 1(i).

Some of the employees at the Monroe facility are classified as lancers/burners, also referred to as cutters. Cutters stand on piles of scrap steel rods and use a torch to cut the rods into smaller, 2-foot sections. In order to perform this work, employees are covered from head to toe in safety gear, including flame retardant clothing, masks, face shields, gloves, safety glasses, and boots. Two cutters may work together in a single cutting bed, however, due to the amount of clothing worn and the noise from the torch, they are unable to talk to each other.

B. Respondent's Work Rules

Respondent maintains a number of work rules, referred to as cardinal rules. Employees sign a copy of these rules and they are posted at Respondent's Monroe facility. GC Exh. 5. Halle testified that all of the cardinal rules are of equal importance.[4] Tr. 18. A violation of the cardinal rules may result in discipline, including suspension or discharge. GC Exh. 5. Among the

[4] Although Halle later testified that certain rules may be more important, I credit his initial testimony that all cardinal rules are of equal importance, which was given before he had a chance to consider the potential significance of this testimony.

cardinal rules, Respondent requires employees to wear personal protective equipment, to refrain from unsafe conduct, to follow safety procedures, and to "promptly and accurately" report an accident or incident to management. GC Exh. 5.

C. The Union's Organizing Drive

In January, Maier contacted the Union about organizing Respondent's Monroe facility. However, little was done in regard to organizing between January and June because Maier encountered personal problems.

In early June, Maier resumed his union organizing activity. Maier met with Union Organizer Grant Warrington at a McDonald's restaurant to discuss the benefits of union membership. At this meeting, Warrington provided Maier with his business cards, blank membership cards, and union literature. GC Exhs. 8, 9, 10; Tr. 24. Maier distributed these items to his fellow employees. Tr. 26, 27. Maier was the only active employee organizer during the Union's campaign. Tr. 70.

The Union held a meeting for interested employees of Respondent on Saturday, June 13, at a restaurant in LaSalle, Michigan. Tr. 28, 69. About 11 or 12 of Respondent's employees attended the meeting, which lasted 3 to 4 hours. Tr. 29, 70. Three union organizers, including Warrington, led the meeting. Tr. 28–29; 69–70. Maier, as well as other employees, gave signed union authorization cards to the Union at or shortly after this meeting. GC Exh. 11, 13, 15. The Union received about 17 cards signed by Respondent's employees during the course of the campaign. Tr. 70.

Word of the organizing drive quickly spread to Respondent's management. Halle received a call from one employee and met with three other employees, all of whom advised Halle that Respondent's employees were seeking to organize. Tr. 12–13; 103–105. Maier was identified as a lead organizer. Tr. 13.

Halle first reported that Respondent's employees were seeking to organize to Reynolds during a Monday morning conference call.[5] Tr. 102. Reynolds advised Halle to talk to him privately after the conference call. Tr. 102. During their second call that morning Reynolds told Halle, "[I]t is what it is. [Y]ou can't do anything about it. Leave it alone. Don't talk to anyone about it. We'll deal with it when it comes." Tr. 102. Halle called Reynolds on multiple occasions to advise Reynolds of information he received regarding employee organizing activity. Tr. 121. Reynolds testified that Halle would contact him as employees approached him [Halle] and report on what he [Halle] was told.[6] Tr. 121.

[5] It is reasonable to assume that this phone call took place on Monday, June 15; the Monday after the meeting of Respondent's employees at the restaurant in LaSalle, Michigan. The restaurant meeting took place on Saturday, June 13. Halle testified that he was initially advised of the Union's organizing drive on the day before this meeting at the restaurant (Friday, June 12), and that he was called by another employee on a Sunday, which presumably was Sunday, June 14. It makes sense that, as Halle was notified of employee organizing activity on June 12 and 14, he notified his superior of this activity on the next work day, June 15.

[6] Although Halle testified that he did not identify the employees who were seeking to organize, I do

Following the discharge of Josh Maier, the Union's organizing drive ended. The uncontradicted testimony of Bill Smith, Tom Brancheu, and Duane Roark, all current employees of Respondent, establishes that they did not talk about the Union after Maier's discharge because they were scared of losing their jobs. Tr. 43–44, 77, 81.

D. Employment of Josh Maier

Josh Maier was employed by Respondent from April 2014 until June 22, 2015, when his employment was terminated for what Respondent alleges was a violation of its cardinal rules. Prior to his discharge, Maier was never disciplined by Respondent. Maier had been previously injured on the job in January while pushing carts.[7] Tr. 46.

On Friday June 12, Maier was working in a cutting bed with employee Bill Smith. Maier fell while he was working that day, but Smith did not see him fall. The entire incident was captured on a surveillance video. GC Exh. 2. The video shows Maier, wearing a yellow vest, and Smith, wearing an orange vest, cutting steel. GC Exh. 2; Tr. 35. At about 5 minutes and 56 seconds, the video shows Maier's fall. GC Exh. 2; Tr. 36. After Maier fell, he got back up and returned to cutting. Id.

About 6½ minutes after his fall, at about 12 minutes and 30 seconds into the video, Maier went to find Halle to report the incident.[8] GC Exh. 2; Tr. 37. He found Halle at a picnic table near the cutting beds. Tr. 37, 56. Smith was with Halle when Maier came to report the fall**.** Maier told Halle that he fell on his arm, but that he thought he would be fine with some Tylenol or Ibuprofen. Tr. 38, 57, 90–91. Halle asked if Maier needed medical attention. Maier said no. Smith advised Halle that he did not see Maier fall. Tr. 37. Halle then said he would make a note of it. Maier and Smith returned to work.[9]

Maier continued to feel sore in the days after his fall, so he went and saw his chiropractor on June 15. Tr. 38. He also took Tylenol and Ibuprofen.

---

not credit this testimony. Halle admitted that he identified the four employee sources of information about employee organizing by name to Reynolds, but did not identify Maier as an organizer. Tr. 106. It seems highly unlikely that Halle would take the time to identify four employees, but not an employee who was identified as a lead organizer. For this same reason, I do not credit Reynolds' testimony that he was not aware of Maier's organizing activities. Tr. 121-122.

[7] Maier was injured while pushing a steel cart or cradle. Tr. 99–100. According to Halle, this incident made him suspicious of Maier because medical reports at that time showed that Maier had degenerative disc disease in his back. Tr. 100. Halle believed that this diagnosis showed that Maier had a prior injury. Id. Reynolds also testified that he was suspicious of Maier due to the incident in which he was injured in January. Tr. 125–126.

[8] Halle admitted that Maier reported his fall on June 12. Tr. 18.

[9] I do not credit the uncorroborated testimony of Halle that Maier told him he was not injured. Tr. 90–91. Instead, I credit Smith's testimony and statement that Maier refused medical attention. GC Exh. 14; Tr. 60. I found Smith to be the more credible witness for the reasons set forth below.

On Friday June 19, Maier reported to work, but began feeling sore by the afternoon. Tr. 38. While still at work, Maier sent Halle a text message, stating, "Hey Neal just in case still sore accross [sic] back from when I fell don't want to cause trouble but it hasnt [sic] gotten much better since then gonna go 2 chiropractor . . . could feel it crunch between shoulder blades when I went down & left arm took all my weight . . ." GC Exh. 12. Halle did not respond to the text message, but later approached Maier and said, "I thought you were okay." Tr. 40. Maier stated that he did not want to cause any trouble and asked to call Reynolds and explain. Halle then stepped away and made a phone call.

When Halle stepped away, he called Reynolds. Tr. 91. Halle told Reynolds that Maier had told him that he [Maier] had tripped and wasn't hurt on June 12, but told him on June 19 that he [Maier] was hurt. Reynolds testified that Halle told him the employee denied needing medical attention.[10] Tr. 122. Reynolds instructed Halle to take Maier to a clinic.

Later that afternoon, Halle took Maier to an industrial clinic for an examination. On the way to the clinic, Halle told Maier that the steel industry was having a rough time and that the Gerdau steel mill was possibly going to close. He also told Maier that they [Respondent's employees] were lucky to be working and that a lot of Tube City employees were laid off.[11] Tr. 41.

Halle remained present in the room while Maier spoke with a doctor and was examined. According to a medical report, Maier told the doctor:

> On June 12th, he was standing on a pile of tubes and cutting them with a torch. The pile of tubes started shuffling. He lost balance and fell on to his left side, hitting his left elbow against the steel parts there. . . He stated that due to quickly falling to left side, hitting the left elbow to the floor, that caused a jerky movement in between shoulder blade area which caused pain.

GC Exh. 16. The above statement in the medical report is consistent with Maier's testimony that he told the doctor that he was cutting, standing on the steel bars when the steel bars rolled and he fell onto his left side. Tr. 42, 92–93. Maier reported that he was not in too much pain on the day of his fall, but that he had felt increasing pain and soreness in the days following the fall. GC Exh. 16. On the day of his exam, Maier reported only mild pain, 2 on a scale of 1 to 10. Id. The doctor's examination did not note any significant objective findings. Maier was diagnosed with a midback strain secondary to a fall. Id. The doctor recommended physical therapy and a course of muscle relaxants, but allowed Maier to return to work without restrictions. Id. After returning from the clinic, Maier's shift was over and he left work for the day.

Halle called Reynolds after returning from Maier's clinic visit. Tr. 93. Halle told Reynolds "the story that he [Maier] told the doctor." Tr. 94. Reynolds advised Halle to search the

[10] Only after prompting from Respondent's counsel did Reynolds add that Halle told him that the employee told him he was not injured. Tr. 123.

[11] Halle did not deny having this conversation. When asked if he said anything to Maier about the steel industry in general, Halle replied, "Not that I recall." Halle was not asked about whether he said anything about the possible closure of the Gerdau mill or regarding Respondent's employees being lucky to have work. As such, I credit Maier's version of this conversation.

surveillance video to find the incident where Maier fell. Tr. 94–95. Halle was unable to locate any video of Maier's fall on Friday. Tr. 95. Halle eventually found the footage on Sunday, June 21. Tr. 95. According to Halle, the video shows Maier looking repeatedly over his shoulder, standing straight up, dropping straight down, and then getting up like nothing happened. Tr. 96–97. Halle believed that the surveillance video showed a different version of events than the one relayed to him on June 12 and to the doctor on June 19.[12] Tr. 96.

On Monday morning, Halle advised Reynolds about what he had seen on the surveillance video. Tr. 97. Halle did not send the video to Reynolds so that Reynolds could watch it. Tr. 98. Allegedly, it was Reynolds who decided to fire Maier after hearing Halle's version of the surveillance video and the alleged discrepancies in Maier's reports of his fall. Tr. 88, 98. According to Reynolds, he decided to discharge Maier for a violation of cardinal safety rules and making a late and false report. Tr. 126. According to Halle, Reynolds told him to terminate Maier for a violation of a cardinal rule. Tr. 98. Halle prepared a form explaining why Maier was terminated. The form states as follows in the section entitled "Description of Infraction":

> On June 12th the employee stated that he had tripped by the cutting beds, I asked him if he was hurt and needed to go to the clinic and he said no he was ok and did not need to be seen. One week later he stated he was hurt but wanted to give it a couple of days to see if it gets better. I took him to the clinic and he told the doctor that he was hurt in the fall and had been hurting every day since. Our cardinal rules state that you must report an incident and injury when it occurs, not a week later.

GC Exh. 4. The form indicates that Maier was terminated for violating a cardinal rule by not reporting an injury. Id. There is no evidence that this form was ever provided to Maier.

When Maier reported for work on June 22, Smith told him that Halle had called him at home by Halle asking about Maier's fall. Tr. 58. Before Maier could go to the cutting beds, Halle stopped him and told him to go into the trailer at the site and read some safety literature. Tr. 42. A short time later, Dave Fry, a leadman, came in and asked Maier to step outside. When Maier stepped outside, Halle told him to turn in his parking pass and equipment because he was being terminated. Maier asked what he was being terminated for and Halle responded it was for falsifying information. Maier asked if he was being terminated for the fall and Halle responded yes because it didn't happen. Maier repeatedly asked to look at the video in order to defend himself, but Halle responded that Maier was done anyway.[13] Tr. 43–44.

Maier left the jobsite and called Warrington. Tr. 44, 72. Maier and Warrington met later at the Flat Rock McDonald's and Maier gave Warrington the remaining signed cards in his

[12] After reviewing the video, I find that it shows Maier falling as he reported to Halle on June 12. The video is not of high quality. Regardless of what Maier was doing just prior to his fall, I do not find that the video suggests that Maier falsified his report.

[13] Halle did not testify about the conversation in which Maier was discharged. As such, Maier's testimony about this conversation stands unrebutted.

possession. Tr. 45. Warrington also viewed the text message from Maier to Halle.[14] GC Exh. 12; Tr. 72.

Three days after Maier was discharged, Halle asked Smith to write a statement about Maier's fall. Tr. 59. Smith's statement indicates that he did not see Maier fall, but did hear him report the fall to Halle. GC Exh. 14; Tr. 60. Halle later solicited a second statement from Smith and specifically asked Smith to state that Maier refused treatment.[15] Tr. 60.

Halle testified regarding how he came to the conclusion that Maier falsified information. When Maier first reported his fall, Halle testified that Maier said he tripped forward and fell onto his arm, but wasn't hurt. Tr. 89–90. On June 19, Halle testified, Maier told the doctor at the clinic that the bars rolled out from underneath him and he fell backwards and hit the back of his elbow on the steel and, when he did so, he felt a crunch between his shoulders. Tr. 90. Halle noted that Maier told him that he [Maier] was not hurt, but told the doctor he felt a crunch between his shoulders. Id. According to Halle, these alleged discrepancies demonstrated that Maier had falsified his report.[16] Id.

Records produced by Respondent indicate that Respondent did not always discharge employees for violations of its cardinal rules. Halle suspended an employee for one day for not wearing protective equipment (hard hat and safety glasses) in violation of the cardinal rules. GC Exh. 7. Although Halle denied making the decision to discharge Maier, he has discharged other employees. Tr. 112. Halle testified that aside from Maier, he has discharged three other employees: two for drug-related instances and one for attendance. Tr. 108. Reynolds testified that he had previously discharged a site manager for violating the cardinal rules by failing to report employees fighting. Tr. 129–130. No documentary evidence was produced by Respondent about the discharges for drug-related incidents, attendance, and the failure to report fighting.

DISCUSSION AND ANALYSIS

A. Witness Credibility

A credibility determination may rely on a variety of factors, including the context of the witness' testimony, the witness' demeanor, the weight of the respective evidence, established or

[14] Although Warrington initially testified that he viewed and photographed the text message on June 19, it was later established that he did not photograph the text message until sometime after July 8. Tr. 74–75. I do not find that this detracted from Warrington's overall credibility. In any event, Halle admitted that he received this text message on June 19. Tr. 91.

[15] Smith insisted that he made 2 separate statements. Respondent maintained that Smith did not make 2 statements, instead asserting that Smith added the second sentence to his original statement. This discrepancy is of no importance, however, as Smith testified that his statements contained the same information as contained in the single statement.

[16] As noted previously, I did not credit Halle's testimony that Maier said he was not hurt on June 12. I further do not credit Halle's testimony that Maier told him that he [Maier] fell forward on June 12 and told the doctors that he [Maier] fell backward on June 19. I note that Halle's testimony about what he was told on June 12 was not corroborated by Smith and Maier. Halle's testimony about what Maier told the doctor was contradicted by the medical report contained in GC Exh. 16.

admitted facts, inherent probabilities and reasonable inferences that may be drawn from the record as a whole. *Double D Construction Group,* 339 NLRB 303, 305 (2003); *Daikichi Sushi,* 335 NLRB 622, 623 (2001) (citing *Shen Automotive Dealership Group,* 321 NLRB 586, 589 (1996)), enfd 56 Fed. Appx. 516 (D.C. Cir. 2003). Credibility findings need not be all-or-nothing propositions—indeed, nothing is more common in all kinds of judicial decisions than to believe some, but not all, of a witness' testimony. *Daikichi Sushi,* 335 NLRB at 622. My credibility findings are generally incorporated into the findings of fact set forth above.

I found Maier to be a credible witness. He testified in a sure and even manner. His testimony was largely corroborated by that of Smith and was supported by the documentary evidence. Although Maier did not recall certain details of his conversation with Halle on June 12, I do not find that this detracts from his overall credibility. The version of this conversation given by Halle was supported by Smith, who I found very credible. As such I generally credited Maier's testimony.

I found Bill Smith to be a particularly credible witness. He testified in a very direct and concise manner. His testimony was not challenged in any significant way on cross-examination. Furthermore, as a current employee of Respondent, his testimony is entitled to enhanced credibility. *Advocate South Suburban Hospital*, 346 NLRB 209 fn. 1 (2006); see also *American Wire Products*, 313 NLRB 989, 993 (1994) (Current employee providing testimony adverse to his employer is at risk of reprisal and thus likely to be testifying truthfully). As such, I credit the testimony of Smith over that of other witnesses.

I further found the brief testimony of Brancheu and Roark to be very credible. Both testified in a steady manner. Respondent chose not to cross-examine these witnesses. Thus, their testimony that the organizing drive at the Monroe facility stopped following Maier's discharge stands uncontradicted and I credit it.

I found Warrington to be a credible witness. He testified in a frank and steady manner. On cross-examination, his testimony was only challenged regarding the date that he photographed the text message sent by Maier to Halle on June 19. I do not find that his failure to recall a single date detracts from his overall credibility. As such, I have credited Warrington's testimony.

I did not find Halle's testimony to be generally credible. He altered his testimony as the hearing progressed. For example, he initially testified that all cardinal rules are of equal importance, but later testified that the rule concerning falsifying a report or belatedly reporting an injury is more important than the rule regarding wearing personal protective equipment. Tr. 18; 107. He gave only a brief recitation regarding his conversation with Maier on June 12 and did so only as a means to show how Maier allegedly gave false information. Tr. 88–89. He further gave implausible testimony, such as that he did not report Maier's fall to Reynolds on June 12 because he did not consider a "trip" to be an accident. Tr. 92. However, I note that elsewhere in his testimony Halle indicated that Maier said that he "fell" and mentioned taking over the counter pain medication. Tr. 89–90. Finally, Halle's recollection of what Maier told the doctor on June 19 is contradicted by the medical report in evidence (GC Exh. 16). As such, I credit Halle's testimony only where it is inherently plausible, corroborated by another credible witness, or supported by the documentary evidence.

I did not find Reynolds' testimony credible. He required prompting by Respondent's counsel to relate the full contents of what he was initially told about Maier's fall by Halle on June 19. Tr. 122–123. Furthermore, he gave self-serving testimony about his previous service as a union steward. Tr. 117–118. I presume that this testimony was given in an effort to establish that he would not have discriminated against a union supporter in this instance. Reynolds' former support for a union is not probative of how he acted in these circumstances. For all of these reasons, I credit Reynolds' testimony only where it is inherently plausible, corroborated by another credible witness, or supported by the documentary evidence.

Finally, I specifically did not credit the testimony of Halle and Reynolds that Halle did not discharge Maier or recommend the discharge of Maier. It was Halle who signed Maier's discharge notice and the notice of suspension for the employee disciplined for failing to wear personal protective equipment. It was Halle who advised Maier that he was discharged. However, even if Halle did not make the ultimate decision to discharge Maier, I find that Halle effectively recommended Maier's discharge. Reynolds' decision to discharge Maier was based solely upon the information provided by Halle. Reynolds did not view the video of Maier's fall, did not interview Smith, who was present for the conversation between Maier and Halle on June 12, and did not interview Maier. There is no evidence that he ever reviewed the medical report regarding Maier's clinic visit on June 19. Thus, Reynolds' decision was made solely based upon statements made by Halle, who knew that Maier was a union organizer.

B. Maier's Discharge Violated the Act

The General Counsel alleges that Respondent violated Section 8(a)(3) and (1) of the Act when it discharged Maier for supporting the Union and for engaging in concerted activities with other employees. Respondent argues, in its defense, that it terminated Maier for a lawful, business-related reason, notwithstanding his engagement in concerted activity. For the reasons discussed herein, I conclude that Maier's engaging in union and protected concerted activity was a motivating factor in his discharge and that his discharge was unlawful.

In determining whether an employee's discharge is unlawful, the Board applies the mixed motive analysis set forth in *Wright Line,* 251 NLRB 1083 (1980), enfd. on other grounds 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp*., 462 U.S. 393 (1983). Under *Wright Line,* to establish unlawful discrimination on the basis of union activity, the General Counsel must make an initial showing that antiunion animus was a substantial or motivating factor for the employer's action by demonstrating that: (1) the employee engaged in union activity; (2) the employer had knowledge of that union activity; and (3) the employer harbored antiunion animus. *Nichols Aluminum*, 361 NLRB No. 22, slip op. at 3 (2014), citing *Amglo Kemlite Laboratories,* 360 NLRB No. 51, slip op. at 7 (2014). Proof of animus and discriminatory motivation may be based on direct evidence or inferred from circumstantial evidence. *Robert Orr/Sysco Food Services*, 343 NLRB 1183, 1184 (2004); *Ronin Shipbuilding*, 330 NLRB 464, 464 (2000). If the General Counsel meets his burden, then the burden shifts to Respondent to prove that it would have taken the same action absent the employee's protected conduct. *Wright Line,* 251 NLRB at 1089; *NLRB v. Transportation Management Corp.,* 462 U.S. 393, 399–403 (1983).

The Board relies on both circumstantial and direct evidence in determining whether the conduct in question was unlawfully motivated. *Fluor Daniel, Inc.,* 311 NLRB 498 (1993). Several factors, including evidence of suspicious timing, false reasons given in defense, failure to adequately investigate alleged misconduct, departures from past practices, and disparate treatment of the discharged employees all support inferences of animus and discriminatory motivation. *Medic One, Inc*., 331 NLRB 464, 475 (2000).

The employer cannot meet its burden merely by showing that it had a legitimate reason for its action; rather, it must demonstrate that it would have taken the same action in the absence of the protected conduct. *Bruce Packing Co.*, 357 NLRB No. 93, slip op. at 3–4 (2011); *Roure Bertrand Dupont, Inc.*, 271 NLRB 443, 443 (1984). If the employer's proffered reasons are pretextual—i.e., either false or not actually relied on—the employer fails by definition to show that it would have taken the same action for those reasons regardless of the protected conduct. *Metropolitan Transportation Services*, 351 NLRB 657, 659 (2007); *Golden State Foods Corp.*, 340 NLRB 382, 385 (2003); *Limestone Apparel Corp.*, 255 NLRB 722, 722 (1981), enfd. 705 F.2d 799 (6th Cir. 1982).

With respect to the General Counsel's initial showing, it is undisputed that Maier engaged in union activity by his efforts to organize Respondent's workforce in 2015. Furthermore, it is undisputed that Respondent, through Halle, was aware of this activity. At issue here is whether Respondent harbored animus toward Maier's union and protected concerted activity. I find that it did.

Several comments made by Halle indicate that Respondent bore animus toward Maier's union and protected, concerted activity. On the way to the clinic on June 19, Halle mentioned: that the steel industry was having a hard time; that the Gerdau mill might close; and that Respondent's employees were lucky to be working. All of these statements appear to be thinly veiled threats that if Respondent's employees unionized, they might lose their jobs. Additionally, on the day of Maier's discharge, when he asked to see the video of his fall in order to defend himself, Halle said, "You're done anyway." This last comment clearly indicates that Respondent intended to discharge Maier no matter what he might say. An employer's failure to permit an employee to defend himself before imposing discipline supports an inference that the employer's motive was unlawful. *Embassy Vacation Resorts,* 340 NLRB 846, 849 (2003). All of these comments support the General Counsel's argument that the motivation for Maier's discharge was unlawful.

The timing of Maier's discharge strongly suggests that it was motivated by his union and protected, concerted activity. Maier fell and reported his fall on Friday, June 12. Later that same day, Halle became aware that Respondent's employees would be meeting with union organizers the next day. On Saturday, June 13, the Union held a meeting with Respondent's employees. Halle became aware of this meeting and Maier's status as a lead union organizer shortly thereafter. I have reasonably inferred that Halle made Reynolds aware of the employees' organizing activity on Monday, June 15, 2 days after the Union's meeting with Respondent's employees. Maier was discharged 1 week later. Animus can be inferred from the relatively close timing between an employee's protected concerted activity and his discipline. *Corn Brothers, Inc.,* 262 NLRB 320, 325 (1982) (timing of discharge within a week of union organizing meeting evidence of antiunion animus); *Sears Roebuck & Co*., 337 NLRB 443, 451

(2002) (timing of discharge, several weeks after employer learned of protected concerted activities, indicative of retaliatory motive); *La Gloria Oil & Gas Co.,* 337 NLRB 1120 (2002) (timing of discipline imposed 4 months after service on bargaining team and ULP hearing appearance suspect). Thus, I find that the timing of Maier's discharge provides strong evidence that Respondent harbored animus toward his union and protected, concerted activity.

Respondent's cursory investigation of Maier's alleged misconduct further provides evidence that his discharge was unlawfully motivated. An employer's failure to conduct a full and fair investigation is a factor that leads to the inference of animus and constitutes evidence of discriminatory intent. See *Firestone Textile Co*., 203 NLRB 89, 95 (1973) (Improper motivation found based on employer's cursory investigation); *Midnight Rose Hotel & Casino, Inc.,* 343 NLRB 1003, 1005 (2004) (Respondent's failure to conduct a fair investigation and to give employee an opportunity to explain her actions before imposing discipline indicates discriminatory motivation). In this instance, Reynolds made the decision to discharge Maier without having seen the video of his fall or the medical report from the industrial clinic. Instead, he relied solely upon the recitations of Halle, who knew that Maier was a lead organizer in the Union's campaign. Respondent did not even seek an initial statement from employee Bill Smith until 3 days after Maier was discharged. Respondent then elicited a further statement from Smith days later in an apparent effort to bolster its claims against Maier.

Furthermore, in reviewing the statements in the medical report contained in GC Exh. 16, I find that they are not at odds with Maier's initial statements to Halle about his fall. Maier initially told Halle that he fell on his arm. Maier told the doctor at the industrial clinic that he fell and hit his left elbow. These are not divergent statements. Although Maier provided more detail to the doctor at the clinic, I do not find, as suggested by Respondent, that this means he falsified his report to Halle. Thus, under all of these circumstances, I find that Respondent's superficial and belated investigation of Maier's alleged misconduct indicates its motivation for his discharge was improper.

I also find that Respondent's shifting justifications for its termination of Maier provide evidence of its unlawful motive. When an employer is unable to maintain a consistent explanation for its conduct, but rather resorts to shifting defenses, "it raises the inference that the employer is 'grasping for reasons to justify' its unlawful conduct." *Meaden Screw Products Co.,* 336 NLRB 298, 302 (2001), citing *Royal Development Co. v. NLRB,* 703 F.2d 363, 372 (9th Cir. 1983). Both Halle and Reynolds testified that they were suspicious of Maier's report on June 12 because of his prior workplace injury. However, this suspicion was not mentioned as a justification for Maier's discharge in Maier's discharge paperwork. Respondent did not advise Maier that it was suspicious of him because of his prior report of a workplace injury. I find that by offering this belated reason for being suspicious of and discharging Maier, that Respondent has offered a shifting justification for Maier's discharge and that this shifting justification provides further evidence of Respondent's animus.

Once the General Counsel has met her initial burden under *Wright Line,* the burden shifts to Respondent to prove that it would have taken the same action absent the employee's protected conduct. An employer does not satisfy its burden merely by stating a legitimate reason for the action taken, but instead must persuade by a preponderance of the credible evidence that it would have taken the same action in the absence of the protected conduct. *T & J Trucking Co.,* 316

NLRB 771 (1995); *Manno Electric, Inc.,* 321 NLRB 278, 280 fn. 12 (1996). What is required is a showing that the employer has consistently and non-discriminatorily applied its disciplinary rules. *Septix Waste, Inc.,* 346 NLRB 494, 496 fn. 15 (2006). It cannot be said, with any degree of reliability, that Maier would have been discharged absent his union and protected, concerted activity. Thus, I do not find that Respondent has made the necessary showing.

Respondent's own records indicate employees are not always discharged for violations of its cardinal rules. Halle suspended an employee for one day for not wearing protective equipment (hard hat and safety glasses) in violation of the cardinal rules. Halle testified that all of the cardinal rules are of equal importance. Thus, the evidence establishes that Maier was treated differently from another of Respondent's other employees in terms of the severity of his punishment for violating a cardinal rule.[17]

The General Counsel made a prima facie case of discrimination under *Wright Line* by demonstrating that Maier engaged in union and protected concerted activity and that Respondent had knowledge of these activities. The General Counsel further established strong evidence of animus towards Maier's union and protected concerted activities. The burden then shifted to Respondent to persuade by a preponderance of the credible evidence that it would have taken the same action in the absence of the protected conduct. Respondent has failed to meet this burden. Therefore, I find that Respondent's discharge of Maier violated Section 8(a)(3) and (1) of the Act, as alleged in the General Counsel's complaint.

CONCLUSIONS OF LAW

1. Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union has been a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent violated Section 8(a)(3) and (1) of the Act when it discharged Josh Maier.

4. By engaging in the unlawful conduct set forth in paragraph 3 above, Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(3) and (1), and Section 2(6) and (7) of the Act.

[17] I have assigned little weigh to Halle's and Reynolds' testimony that Halle discharged two employees for drug-related offenses and one for attendance and that Reynolds discharged a site supervisor for failing to report employees fighting. No documentary evidence was produced to support these claims. Furthermore, there was no evidence adduced as to when Halle discharged the three employees. Reynolds testified that he discharged the site supervisor when he first took control of the Monroe facility, but there is no evidence as to when that occurred.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I shall order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

As part of the remedy in this case, the General Counsel has requested that I order Respondent to reimburse Maier for all search-for-work and work-related expenses incurred regardless of whether he received interim earnings in excess of such expenses. Backpay issues are resolved by a factual inquiry at the compliance stage of the proceeding, *Island Management Partners,* 326 NLRB No. 158 slip op. at fn. 4 (2015), citing *J. E. Brown Electric*, 315 NLRB 620 (1994). Furthermore, the Board has previously declined to order such relief it would involve a change in Board law, and the parties did not fully brief the issue to the Board. *Katch Kan, USA,* 362 NLRB No. 162 slip op. at fn. 2 (2015), citing *Ishikawa Gasket America, Inc*., 337 NLRB 175, 176 (2001), enfd. 354 F.3d 534 (6th Cir. 2004), and cases cited therein. Therefore, I decline to order that search-for-work and related expenses be ordered as part of the backpay remedy at this stage of the proceedings.

The Respondent, having discriminatorily discharged employee Josh Maier, must offer him reinstatement and make him whole for any loss of earnings and other benefits. Backpay shall be computed in accordance with *F. W. Woolworth Co*., 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center,* 356 NLRB No. 8 (2010).

Respondent shall file a report with the Social Security Administration allocating backpay to the appropriate calendar quarters. Respondent shall also compensate the discriminatee for the adverse tax consequences, if any, of receiving one or more lump-sum backpay awards covering periods longer than 1 year. *Don Chavas, LLC d/b/a Tortillas Don Chavas,* 361 NLRB No. 10 (2014).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[18]

ORDER

The Respondent, Tube City IMS, LLC, Monroe, Michigan, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging or otherwise discriminating against employees because they engage in union activities or support a union.

[18] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of the Board's Order, offer Josh Maier full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(b) Make Josh Maier whole for any loss of earnings and other benefits suffered as a result of the discrimination against him in the manner set forth in the remedy section of the decision.

(c) Within 14 days from the date of the Board's Order, remove from its files any reference to the unlawful discharge of Josh Maier, and within 3 days thereafter notify him in writing that this has been done and that the discharge will not be used against him in any way.

(d) File a report with the Social Security Administration allocating backpay to the appropriate calendar quarters.

(e) Compensate Josh Maier for the adverse tax consequences, if any, of receiving one or more lump-sum backpay awards covering periods longer than 1 year.

(f) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(g) Within 14 days after service by the Region, post at its facility in St. Louis, Missouri copies of the attached notice marked "Appendix."[19] Copies of the notice, on forms provided by the Regional Director for Region 7, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall

[19] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since June 22, 2015.

(h) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. February 12, 2016

Melissa M. Olivero
Administrative Law Judge

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT discharge or otherwise discriminate against you because you engage in union activity or support a union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL within 14 days from the date of this Order, offer Josh Maier full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make Josh Maier whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, with interest.

WE WILL compensate Josh Maier for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and we will file a report with the Social Security Administration allocating the backpay award to the appropriate calendar quarters for him.

WE WILL, within 14 days from the date of this Order, remove from our files any reference to the unlawful discharge of Josh Maier, and WE WILL, within 3 days thereafter, notify Josh Maier in writing that this has been done and that the unlawful discharge will not be used against him in any way.

TUBE CITY IMS, LLC

(Employer)

Dated _____ By _____

(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

477 Michigan Avenue, Room 300, Detroit, MI 48226-2569
(313) 226-3200, Hours: 8:15 a.m. to 4:45 p.m.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/07-CA-154813 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (313) 226-3244.